FOOD MARKETING INSTITUTE

February 18, 2011

Submitted Electronically

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20507

RE: Comments of the Food Marketing Institute (FMI) on "Notification of Employee Rights under the National Labor Relations Act" (RIN 3142-AA07)

Dear Mr. Heltzer:

The Food Marketing Institute ("FMI") welcomes this opportunity to submit the following written comments in response to the above-captioned Notice of Proposed Rulemaking on "Notification of Employee Rights under the National Labor Relations Act." 29 CFR Part 104 [RIN 3142-AA07].

FMI represents 1,500 food retailers and wholesalers. Our retail membership is composed of large multi-store chains, regional firms and independent supermarkets with a combined annual sales volume of $680 billion (three-quarters of all retail food store sales in the United States). FMI membership includes: 26,000 retail food stores; 14,000 pharmacies; Associate members which are supplier partners of its retail and wholesale members; and 200 companies from more than 50 countries.

Our membership includes retailers and wholesalers which employ union-represented employees and which have long-standing collective bargaining relationships, as well as those which are union free. FMI members are covered by the National Labor Relations Act and would be subject to the proposed notice-posting requirement for employee rights under the Act.

FMI members post numerous government workplace notices in compliance with a variety of state and federal laws. We do not oppose having our employees made aware of their legal rights under labor and employment laws.

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We are concerned that at some point employees may become overwhelmed with the sheer number of such notices which would detract from their purpose and effectiveness. However, we are concerned especially with a notice, such as the one proposed in the current NPRM for "Notification of Employee Rights under the National Labor Relations Act," which we believe goes well beyond simply informing employees of their Section 7 rights and provides imbalanced and incomplete information.

FMI believes that any such notice should be objective, unbiased, and clear so as not to mislead employees. It concerns us that some of the "advice" as to how to exercise rights under the Act may be incomplete or misleading, which could cause employees to rely on that advice to their detriment. Finally, we believe that the proposed notice omits important rights that employees have even after a union has been certified or recognized, which would be important for both union-represented and non-represented employees to understand in advance.

Finally, FMI does not believe that the National Labor Relations Board has the authority to require our members to post employee rights notices absent specific Congressional approval and direction, as is the case with other workplace laws. Further, we do not believe that the Board has the authority to create new unfair labor practice charges arising from such unauthorized substantive policies outside the specific approval and direction of Congress.

Therefore, we believe the proposed rule would have a significant impact our membership and accordingly submit the following comments.

INTRODUCTION

On December 22, 2010, the National Labor Relations Board ("NLRB" or the "Board") published an NPRM in the Federal Register entitled "Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act." 75 Fed. Reg. 80,410 (Dec. 22, 2010). The proposed rules would, for the first time in the seventy-five year history of the National Labor Relations Act ("NLRA" or the "Act"), require all employers covered by the Act to post notices describing employees' rights under the Act. The Board claims authority under the rulemaking provisions of Section 6 of the Act. Public comments on the proposed rule are due by February 22, 2011.

The NPRM represents an unprecedented and we believe *ultra vires* federal regulatory intrusion into virtually every private sector workplace in the country where employees have not elected to be represented by a union and where there is no allegation of any unfair labor practice. Under current law, workplace notices are required under the NLRA only in connection with a remedial order following adjudication of an unfair labor practice charge or in connection with a union representation election. However, the Board acknowledges that nearly six million businesses

will be affected by the proposed employee rights notice.[1] Compare that to the relatively small total number of unfair labor practice charges and the number of representation petitions filed annually with the NLRB. [2] The Board's proposed employee rights poster represents a huge increase in the regulatory obligation imposed on employers to post Board notices.

In addition to the posting requirement in the workplace, the NPRM also would require many employers to distribute the workplace notice electronically through email or the intranet when the employer "customarily" communicates with employees in that manner. The NPRM does not define what the Board will consider as being sufficiently "customary" to trigger the electronic posting requirement. The NPRM also requires that the notice be presented in multiple languages when employees are multi-lingual or "not proficient in English." Again, the NPRM does not quantify the number or percentage of foreign-speaking employees the Board will consider sufficient to require posting in foreign languages, other than a "significant number." Finally, the NPRM creates out of whole cloth and outside of Congress, a new substantive unfair labor practice charge, as well as other punitive sanctions, for an employer's failure to post and retain the notice in the workplace and/or failure to post it electronically.

BACKGROUND

As justification for the proposed rules, the Board claims that employees simply do not know their rights under the National Labor Relations Act. The Board's reasoning is that were employees more familiar with their rights under the Act, they would exercise those rights by filing unfair labor practice charges more frequently and the number of representation petitions for union organizing would increase. Presumably, that would lead to greater union density, as well as increased instances of concerted activity, including collective bargaining and job actions.

There simply is not evidence that employees of food retailers and wholesalers are unaware of their rights under the NLRA, or that their interest in unions would significantly increase were they more familiar with those rights. Neither is there evidence demonstrating that the long-term decline in union density would be reversed, or even substantially improved, by increasing information to employees of their rights under the NLRA.

Employees are certainly aware of their rights from union solicitations and union websites, as well as the websites of numerous other organizations. They are aware of how to inquire and receive more information as to their rights from the NLRB either on its website or simply by picking up the phone and calling an NLRB information officer in a Regional Office. There is no reason to believe that employees need, or even want, a reminder from the employer about their rights to join a union

[1] 75 Fed. Reg. 80,415.
[2] See National Labor Relations Board, Office of the General Counsel, *Memorandum GC 11-03* at 2 (Jan. 10, 2011), *available at* http://www.nlrb.gov/shared_files/GC%20Memo/2011/ GC%2011-03%20Summary%20of%20Operations%20FY%2010.pdf.

or engage in concerted activity. Yet, the proposed rules would, in the absence of any allegation of an unfair labor practice or representation petition, impose a notice-posting obligation on all employers covered by the NLRA and the 93.1% of private sector employees who have not selected unions as their exclusive bargaining representative.

We believe the Board does not have authority to implement the proposed rule. However, if the Board mandates posting of employee rights notices after 75 years of the Act's history, perhaps the Board should defer until after it has the benefit of experience under the Department of Labor's notice, which is the same as the Board's proposed notice, that is required of government contractors.

Our substantive arguments follow:

ARGUMENTS

I. Lack of Authority.

We believe that the NLRB does not have the statutory authority within the NLRA, even under the broad rulemaking authority in Section 6 of the Act, to impose this massive new regulatory obligation on over six million companies, including FMI members. Unlike other federal labor and employment laws, Congress did not enact a notice posting requirement when it passed the Wagner Act in 1935, or in the subsequent Taft-Hartley Act amendments of 1947 or the Landrum-Griffin Act amendments of 1959. Yet, Congress clearly knew how to do so, since prior to the 1935 Wagner Act Congress had amended the Railway Labor Act to provide a notice posting obligation.[3]

In addition, we believe the NLRB does not have the statutory authority to impose significant new substantive penalties against employers who fail to post this notice, including a finding that a failure to post the notice will constitute an independent unfair labor practice and result in an

[3] Indeed, the rulemaking authority under Section 6 of the Act is designed to interpret existing rights already contained within the statute, not to create new ones outside of Congress. It is for that reason, perhaps, that rulemaking, as compared with case-by-case adjudication, has been used extremely rarely by the NLRB such as, for example, in defining appropriate bargaining units in the acute health care industry. The right to an appropriate bargaining unit, of course, already existed within the NLRA prior to the Board's health care rulemaking when Congress enacted the 1974 Health Care amendments. Therefore, an interpretation of what would constitute an appropriate bargaining unit for hospitals would seem to benefit from rulemaking rather than case-by-case adjudication involving repetitive or similar fact patterns, and would seem more likely to fulfill the stated desire of Congress to prevent the proliferation of bargaining units in that industry. Here, however, there is no comparable direction from Congress with which to support the current NPRM. If the Board feels that it needs a workplace notice of employee rights, it should go to Congress for authorization.

indefinite tolling of the statute of limitations for filing any other unfair labor practice charge.[4] As the Supreme Court has made abundantly clear from the earliest days of the Act, that outside of a Congressional amendment to the Act the Board simply does not have authority to create new punitive sanctions, nor to impose these obligations and penalties against an employer when there has been no finding (or even an allegation) of an unfair labor practice. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940).

FMI member companies are not opposed to employees knowing their legal rights under workplace laws. Of course, we post government posters in our workplace for many federal agencies, each under a separate statutory mandate. *See* Title VII of the Civil Rights Act of 1964,[5] the Age Discrimination in Employment Act,[6] the Occupational Safety and Health Act,[7] the Americans with Disabilities Act,[8] the Family and Medical Leave Act,[9] and the Uniformed Service Employment and Reemployment Rights Act.[10] The Board itself recognizes that the NLRA "is almost unique among major Federal labor laws in not including an express statutory provision requiring employers routinely to post notices at their workplaces informing employees of their statutory rights."[11] There is a reason for that: unlike other agencies, the NLRB has never been given specific statutory authority to require the posting of a general workplace notice.

For the independent labor agencies, the specific statutory authority for notice posting in the Railway Labor Act,[12] stands in sharp contrast to the general rulemaking authority in Section 6 of the NLRA.[13] Indeed, as the Supreme Court noted in 1938, the Railway Labor Act served as the model for the National Labor Relations Act.[14] In 1934, just one year before the NLRA was

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[4] 75 Fed.Reg. 80,414. The proposed rules also state that an employer's failure to post the notice could be used as evidence of an unlawful, anti-union motive in adjudicating subsequent unfair labor practice allegations. *Id.* at 80,414-15.

[5] 42 U.S.C. § 2000e-10.

[6] 29 U.S.C. § 627.

[7] 29 U.S.C. § 657(c).

[8] 42 U.S.C. § 12115.

[9] 29 U.S.C. § 2619(a).

[10] 38 U.S.C. § 4334(a).

[11] 75 Fed Reg. 80,415.

[12] 45 U.S.C. § 152 Eighth.

13.*See, NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 266 (1938) ("Congress, in enacting the National Labor Relations Act, had in mind the experience in the administration of the Railway Labor Act, and declared that the former was 'an amplification and further clarification of the principles' of the latter." (quoting Report of the House Committee on Labor, H.R. 1147, 74th Cong., 1st Sess., p. 3)).

14. Although the Fair Labor Standards Act ("FLSA") does not contain a specific statutory provision on workplace postings, the Department of Labor invoked the recordkeeping provisions in Section 11 of the FLSA, 29 U.S.C. § 211(c), which compel employers to "make, keep, and preserve such records" and to "make such reports" as required by the Department of Labor. See 27 Fed. Reg. 525 (Jan. 18, 1962). No similar recordkeeping requirement exists in the NLRA.

enacted, Congress amended the Railway Labor Act ("RLA") to include an express notice posting requirement. 45 U.S.C. § 152 Eighth; Pub. L. No. 73-442, 48 Stat. 1185, 1188 (1934). The fact that Congress did not include a similarly specific notice-posting requirement when passing the NLRA one year later is a strong indication that Congress did not intend for the NLRB to have authority to require such a notice by regulation. To create a legal basis for a general workplace notice the NLRB now must go back to Congress for statutory authority as every other agency has done with respect to laws they enforce. It would seem to be simple enough for the Board to request authority from Congress in the form of an amendment to the Act, as Congress did under the Railway Labor Act amendments. Otherwise, the Board's action is *ultra vires*.

Obviously, the workplace notice posting requirement for federal contractors under the Executive Order issued by President Obama, 29 C.F.R. Part 471, has its own independent legal basis pursuant to the President's authority to issue Executive Orders. That is not the case with the Board's proposed rule, however, even though it is modeled after the Executive Order notice and that the Board's NPRM states that the Executive Order notice can serve in lieu of the Board notice.

II. Enforcement.

There is an even stronger argument that the NLRB lacks the authority to create new substantive rights and penalties outside of Congress. See, e.g., *Republic Steel Corp. v .NLRB*, *supra*. The Board proposes the following sanctions for failure or refusal to post the required employee notices: (1) finding the failure to post the required notices to be an unfair labor practice; (2) tolling the statute of limitations for filing unfair labor practice charges against employers that fail to post the notices; and (3) considering the knowing failure to post the notices as evidence of unlawful motive in unfair labor practice cases.

The Board's NPRM specifically invited comments on each of its newly created enforcement provisions. We observe as follows.

1. New "Unfair Labor Practice."

The proposed rule creates a new unfair labor practice for failure to post the required employee notice. In addition to a "cease and desist" order and posting of the order and a remedial notice, the rule suggests "some additional [unspecified] remedies." Thus, the proposed rule improperly creates and adds new substantive rights and new sanctions to the Act outside of congressional action. Presumably, if the Board were allowed simply to add a new unfair labor practice to the Act for failure to post a newly-created substantive obligation to post employee rights notices - e.g., a new Section 8(a)(6) – what's to stop it from creating other new obligations and unfair labor practice charges outside of the legislative, policy-making process?

2. "Tolling" the Statute of Limitations.

The proposed rule's tolling (i.e., suspending) the six-month statute of limitations period for the filing of unfair labor practice charges contained in Section 10(b) of the Act ("no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board") is clearly a punitive sanction designed simply to punish employers for failing or refusing to post the workplace notice. Worse, the tolling opens the door to allegations of past unfair labor practices which, the Board would argue, were not filed because, absent the notice, the employee lacked sufficient knowledge about the NLRA itself in order to file a timely charge. This is a phenomenal policy leap from the only administrative exception to the six month limitation to the filing of unfair labor practice charges currently permitted by the Board. Currently, the limitations period is tolled only when facts necessary for the filing of the charge have been "fraudulently concealed" by an employer or union, and as a result the employee was unaware of the basis for filing a charge – e.g. unaware of the true facts.[15]

To suggest that "ignorance of the law" should be sufficient to toll the statute of limitations, especially where that ignorance is alleged to have been caused by the employer's failure to post a notice, would open the floodgates to tainted, and stale or outdated charges that would turn the limitations policy on its head. The purpose of the six-month statute of limitations under the NLRA, as with other statutes of limitations under other laws, is to "bar litigation over past events after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused."[16] This is an especially sound labor policy in the interests of "industrial peace," resolution of workplace disputes which otherwise might obstruct interstate commerce, and the effective administration of the Act. The simple failure to post a notice, without proof of an intent to actively mislead an employee respecting a particular cause of action, should not be used to extend the time within which the alleged discriminatee should be required to file an unfair labor practice charge pursuant to the limitations of Section 10(b).

3. "Presumption of Unlawful Motive."

Also, to burden employers with a presumption of "unlawful motive" in all future unfair labor practice cases simply because of the employer's noncompliance with the Board's notice posting requires another huge leap of logic. Linking the two, even in situations of "knowing noncompliance" with the notice posting requirements, is purely a punitive sanction designed to punish the employer. The employer's motivation, if any, in failing to post a notice is not proof of the employer's motive, or lack thereof, in a future unfair labor practice charge.

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[15] The Act also contains a statutory exception for the filing of unfair labor practice charges within six months where the delay is caused by an employee's service in the armed forces.

[16] *Kanakis Co., Inc.*, 293 NLRB 435, 438 (1989) (citing to the Taft-Hartley Act's legislative history).

III. Contents of Notice.

Perhaps our biggest practical concern with the proposed rule is with the contents of the Notice itself. Even assuming for the sake of argument that the NLRB had the authority to require employers covered by the Act to post the proposed notice, which it does not, the truth is that the Board's proposed Notice far exceeds the short and plain description of rights contained in the Board's current remedial notices for unfair labor practices – a description that the Board found was sufficient to "clearly and effectively inform[] employees of their rights under the Act."[17] Rather, under the Notice as drafted, the listing of employee rights vis-à-vis employers, and particularly the examples given of specific rights derived from Board and court decisions implementing those rights, has the very real potential for needlessly disrupting the workplace. Selective, incomplete, and even misleading advice for employees goes far beyond a notice informing employees of their Section 7 rights under the Act. Yet, at the same time, by focusing mainly on employee rights vis-à-vis employers, the Notice does not go far enough in informing employees of their rights vis-à-vis unions.

The NPRM explains that unlike the proposed employee notice "the purpose of the [current] remedial notices is chiefly to inform employees of what employers and/or unions have done to violate their NLRA rights, and less to inform them of their rights in general."[18] Then, it seems to us, that in the proposed Notice the Board starts down the slippery slope away from simply informing employees of their general rights under the Act, and instead tries to advise employees of how to exercise certain rights. The Board picks and chooses certain specific rights to highlight to the exclusion of other equally important rights, and attempts to do so "without going into excessive and confusing detail" of explaining the nuances, exceptions, and frequent changes in the interpretation of those rights.

The Board's NPRM merely copies the flawed notice required by the Department of Labor for federal contractors under President Obama's Executive Order. This is disappointing coming from the Board which is, after all, the "independent" federal agency with the expertise under the National Labor Relations Act, unlike the Department of Labor. Congress, the public and parties to the Act have the right to expect that the Board, as an independent agency, will be an objective, nonpartisan, and neutral arbiter, rather than a "cheerleader" for one side or the other which might be expected of an Executive Branch agency charged with advancing the Administration's policy objectives. For the Board to do so would undermine its credibility with the public as well as in the courts.

While one of the purposes of the Act is to encourage the policies and procedures of collective bargaining, certainly the Board should not lightly abandon its historic, and wise, policy of

[17] *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 177 (2001).
[18] 75 Fed. Reg. 80,412, n.19.

neutrality in the union election process, only then to be seen as supporting a partisan agenda to reverse the decline in union density, as much as that is to be desired. In that regard, the Board would do well at the outset of the notice to assure readers that the Act is designed to protect employees' rights, not union rights or management rights, and that it is for employees to decide whether or not to be represented by a union for purposes of collective bargaining or to engage in protected concerted activities. In those decisions, the Board must proclaim its neutrality.

It is with this in mind that we believe the proposed Notice should be withdrawn, or at least substantially corrected so as not to mislead employees or to cause them to take actions in reliance on the proposed notice for which they could be lawfully disciplined or even terminated for unprotected actions or speech. Moreover, if revised, the Notice should be better balanced between rights vis-à-vis unions and management so as to remove any question as to its objectivity.

1. Opening Statement.

The first paragraph of the Notice describes the rights guaranteed under the Act in general terms as 'the right to organize and bargain collectively with their employers, and to engage in other protected concerted activity." However, the Notice does not indicate that an equivalent right guaranteed under the Act is for employees to "refrain" from any of the above. Since this is the first sentence in the Notice, it would be important to note the two countervailing rights at the outset.

2. List of Rights.

<u>What Rights Are Not Included in the Notice</u>:

In the first place, the Notice totally ignores most of the rights of union-represented employees seemingly in the mistaken belief that the Board's only obligation is to inform the 93.1% of unrepresented employees of *their* rights. The NPRM suggests that it is unimportant to inform represented employees of their so-called *Beck* rights, since those rights would apply only to a "relatively small number of workplaces where union-security provisions exist" and there are "too few employees who might benefit from such specific notice." The NPRM reasons that, as required by law, unions will adequately inform them of their rights once they are represented.

Thus, the Notice fails to even mention *Beck* rights, or the rights to decertify an incumbent union, or the right to fair representation in processing grievances and engaging in arbitration under a union's duty of fair representation. Other than a brief mention at the end of the list of employee rights, the Notice fails to inform employees of their rights to refrain from concerted activity. In fact, the Notice fails to inform employees of their rights to:

- Refrain from forming, joining, or assisting labor organizations;

- Refuse to engage in concerted activity with other employees (although you may be subject to fines or other union discipline for refusing to strike or engage in picketing);

- Refrain from being a full-dues paying, formal union member (although in certain states you must pay "core" representational fees);

- Resign from formal union membership at any time;

- Refuse to pay any union dues if you work in a Right to Work state;

- Insist on fair representation by your union if you are included in the bargaining unit, regardless of your membership status (it is unlawful for a union to refuse to represent you or process your grievance because you are not a member of the union); and

- Petition for an election to decertify a recognized or certified union or to deauthorize the union from collecting dues.

In fact, a more complete Notice could advise employees of their rights as union members under the "Employee Rights" provisions of the Labor-Management Reporting and Disclosure Act 29 CFR Part 401 et seq., and other sources, that it is unlawful for a union to:

- Require nonmembers to pay a fee to receive contractual benefits;

- Video tape / photograph non-striking members;

- Discipline members who refuse to engage in unprotected activity which would subject them to lawful discipline;

- Discipline members for exercising Section 7 rights to participate in grievance-arbitration proceedings in a manner that is adverse to the grievant or the union;

- Engage in perfunctory or careless grievance handling;

- Refuse to allow you to vote on union matters, such as the election of officers, strike votes, and contract ratification;

- Fail to provide *Beck* notices to all unit employees, both members and nonmembers alike, informing them of their rights under *Communications*

Workers v. Beck [487 U.S. 735 (1988)] and *NLRB v. General Motors* [373 U.S. 734 (1963)] to withhold a portion of their union dues spent for non-collective bargaining or contract administration purposes. Unions must inform employees of their *Beck* rights either at the time of their hire or once during their employment before the union seeks to obligate the employee to pay dues under a union security clause manner;

- Require you to agree to dues checkoff as opposed to paying dues directly; and

- Apply hiring hall rules in a discriminatory manner.

What Rights are Included in the Notice:

With over 75 years of decisions contained in 356 volumes interpreting and reinterpreting employee rights, continually redefining limits on and exceptions to those rights, any generalized notice of employee rights under the NLRA will almost certainly mislead employees. For that reason, a simple and direct statement of employees' Section 7 rights, with information as to how to contact the NLRB for further information, should suffice to inform employees of their basic legal rights under the Act. Such a notice would be far more acceptable and far less controversial. However, to inform employees of only certain specific rights, and thereafter to "advise" them how to exercise those select rights, goes far beyond a simple posting of rights. In fact, all of the rights included in the proposed Notice require clarification or more complete explanation so as not to mislead employees into engaging in unprotected conduct. For the sake of brevity, however, below are just a couple of rights listed in the proposed Notice with a discussion of how those rights, standing alone, will potentially do more harm to employees than good.

- "Discuss your terms and conditions of employment or union organizing with your co-workers or a union."

This right, standing alone, neglects to inform employees that an employer is permitted to enforce a policy prohibiting the use of email for all "non-job related solicitations" including union-related emails so long as the employer does not allow its employees to use the email system to solicit support for or participation in any other type of outside organization. See, *The Register Guard*, 351 NLRB 1110 (2007).

In addition, without clarification this right could easily mislead employees to believe that they have an absolute right to speak with union representatives on the employer's property. The Supreme Court addressed this issue nearly 20 years ago in *Lechmere v. NLRB*, 502 U.S. 527 (1992) when it held that an employer who prohibits nonemployee solicitation on its property may lawfully prohibit protected activity by nonemployees on its property except in the rare case where "the

inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels."

- "Strike and picket, depending on the purpose or means of the strike or the picketing."

Merely qualifying the right to strike and picket as "depending on the purpose or means of the strike or the picketing" is woefully insufficient to warn employees about the limitations on this type of activity. Here again, therefore, the proposed Notice runs the risk of encouraging employees to engage in unprotected conduct.

For example, Section 8(b)(7) places limitations on picketing where an object of the picketing is for recognition or bargaining. See, e.g. *Plumber & Pipefitters Local 32 (Bayley Construction),* 315 NLRB 786 (1994). In addition, the Supreme Court has ruled that Section 8(b)(4) makes "every form of influence or persuasion" with regard to secondary/neutral employers unlawful where the purpose of the activity is to get the neutral/secondary employer to cease doing business with another entity. See, *IBEW Local 501 v. NLRB (Sam Langer),* 341 .S. 694 (1951); *NLRB v. Denver Building and Construction Trades Council,* 341 U.S. 675 (1951).

It is also well-settled that picketing may be limited pursuant to a lawful "reserve gate" system. See, e.g. *General Electric*, 366 U.S. 667 (1961).

Employees should also understand that if they engage in a lawful economic strike, they could be permanently replaced. *Laidlaw Corp.,* 171 NLRB 1366 (1968). Likewise, if they engage in a lawful unfair labor practice strike, they may still be temporarily replaced. *Mackay Radio & Telegraph Co.,* 304 U.S. 333 (1938).

As it stands, this right in the proposed Notice also fails to warn employees about strikes that are unprotected because they are carried out by unlawful means (e.g. sit down strikes; slow-down strikes; partial or intermittent strikes; and violent strikes).

Strikes may also be unlawful if the purpose of the strike is for unlawful or wrongful ends (e.g. strikes in violation of a collective bargaining agreement that contains a no-strike clause; strikes in violation of the Act itself -- such as striking to compel an employer to assign certain work to the striking union; featherbedding; striking to compel an employer to recognize or bargain with a union that represents both guards and non guards; striking in violation of notice requirements in the health care industry; striking in violation of Section 8(d) notification; etc.).

Finally, the Notice fails to warn employees that they may be "permanently replaced" if they engage in an economic strike, with the right to be placed on a preferential rehire list if jobs occupied by replacement workers become available. It also fails to inform employees that replacement

workers must be notified that in the event of an unfair labor practice strike, the returning strikers have the right to reclaim their jobs.

All of this might seem like excessive information. However, absent such detail, an employee may feel fully justified in taking the government's advice set forth on the poster and later, to the employee's surprise, be misled and suffer adverse consequences in reliance on the incomplete "advice" from the poster.

Finally, with regard to collective bargaining, the proposed Notice states:

> "If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain collectively in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement."

Here again, the Notice provides employees with an incomplete picture of the law. While it is certainly true that an employer and the union representing its employees have a mutual obligation to bargain in good faith in an attempt to reach a written, binding agreement, it is also true that Section 8(d) of the Act expressly provides that neither party has an obligation to agree to a proposal or to make a concession. In fact, the Supreme Court has interpreted this language to preclude the Board from compelling a party to agree to a particular proposal even as a remedy for a breach of the obligation to bargain in good faith. H.*K. Porter Co. v. NLRB,* 397 U.S. 99 (1970).

Employees should also understand that if after bargaining in good faith, the parties are at impasse in negotiations, an employer does not violate the Act by implementing terms and conditions that are "reasonably comprehended within his pre-impasse proposals." *Taft Broadcasting Co.,* 163 NLRB 475 (1967), enf'd 395 F. 2d 622 (D.C. Cir. 1968).

The Board has long held that whether a bargaining impasse exists "is a matter of judgment." Id. In *Taft Broadcasting Co..,* the Board enumerated five factors it takes into account in making this determination:

> The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issues as to which there is a disagreement, the contemporaneous understanding of the parties as to the state of the negotiations are all relevant factors in deciding whether an impasse in bargaining existed.
>
> Id. at 478

In light of the above, it is clear that the Notice as written fails to provide employees with an understanding of what their rights actually are under the NLRA. It should be made clear that not every negotiation results in a contract. It also should be made clear that employees have a right to ratify or reject a collective bargaining agreement, and that a contract may provide more or less than the employees current terms and conditions of employment.

Too much detail? Partial information is potentially dangerous as employees may, understandably, take the word of the NLRB as gospel in "guaranteeing" a contract and with "guaranteeing" other rights under the Act. It's better to keep the Notice simpler and more direct, as with a verbatim recitation of employees' Section 7 rights, with a notification informing employees of NLRB website contact information where they can secure additional, more complete advice.

CONCLUSION

For the foregoing reasons, FMI urges the Board to withdraw the proposed employee rights Notice and seek authority from Congress before resubmitting a new proposal. Short of that, FMI encourages the Board to recall the proposed Notice and substantially revise and rewrite it in a much simpler; more direct style was suggested in these comments.

FMI appreciates the opportunity to comment on this important matter.

Sincerely,

Erik R. Lieberman
Regulatory Counsel